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**Supreme Court of the United States**

OCTOBER TERM, 1966

No. 615

RALPH BERGER,

Petitioner,

*against*

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

**BRIEF FOR THE ATTORNEY GENERAL OF THE  
STATE OF NEW YORK, AS AMICUS CURIAE IN  
SUPPORT OF RESPONDENT**

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**BRIEF FOR THE ATTORNEY GENERAL OF THE  
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SUPPORT OF RESPONDENT**

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**Interest of the Amicus**

Both questions certified by this Court in granting petitioner's application for certiorari are of direct and substantial interest to the Attorney General of the State of New York. The second question specifies the issue of the constitutionality of a statute which is part of New York's comprehensive scheme to limit and control electronic eavesdropping within our boundaries (Code of Crim. Proc. § 813-a). The New York Attorney General is charged with the defense of the enactments of our State Legislature.

(See Executive Law § 71). The first question certified by this Court involves the validity of the conviction obtained in a court of our State and upheld by our Court of Appeals. Furthermore, the New York Attorney General, as a prosecutor, is one of the officials entitled to apply for court orders permitting electronic eavesdropping under the Code of Criminal Procedure § 813-a.

New York's Code of Criminal Procedure § 813-a, conforms precisely to the language and fully to the spirit of the Fourth Amendment's protection of the right of the people to be free of unreasonable search and seizure. Indeed, it is a part of a legislative program especially undertaken to protect the privacy of the individual and to limit, not to liberalize, the use of eavesdropping. The introduction of the recordings obtained pursuant to court order in the instant case was an appropriate use of this procedure and necessary to an investigation of utmost importance to the integrity of our state government.

Concerned over the challenge to the validity of New York's statute regulating electronic eavesdropping and convinced that court-ordered eavesdropping does not jeopardize the fundamental rights of our citizens, but, on the contrary, is necessary for their personal safety and wholesome public life, we file this brief pursuant to Rule 42(4) of the Rules of this Court.

We agree with and endorse fully the position taken by the District Attorney in defense of the New York statute. In light of the complete and scholarly discussion of the complex issues of constitutional law contained in respondent's brief, and in light of the wealth of material presented by the National District Attorneys Association and Attorneys General of several of our sister states as *amicus curiae*, we have limited the scope of this brief to a presentation of the total New York statutory scheme of which the challenged § 813-a is but a part.

## ARGUMENT

**The legislative history and companion statutes of § 813-a demonstrate that New York effectively prohibits all eavesdropping except by law enforcement officers acting with Court authorization upon a showing that there is probable cause within the meaning of the Fourth and Fourteenth Amendments.**

An examination of the New York laws regarding electronic eavesdropping\* demonstrates that New York strictly limits and regulates this practice by restricting the circumstances in which eavesdropping may be employed and by punishing as felons all persons, including law enforcement officers, who act outside these strictures\*\*. This statutory scheme is the result of the Legislatures's dedicated and considered commitment to the privacy and dignity of the individual.

No other legislature in this Country has made a comparable effort to protect its citizens from the encroachment of modern electronic recording and amplifying devices into their private conversations. It is ironic that it is just the State which has debated and agonized over the right to privacy and which has produced a statutory scheme to protect that right whose acts are challenged as unconstitutional.

The decision of New York not to prohibit all electronic eavesdropping by law enforcement officials was made upon careful consideration of the competing interests of the individual. This legislative resolution of the constitutional

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\* These laws are reproduced as an appendix to this brief.

\*\* It is a felony for a law enforcement officer to eavesdrop except under Court order (§ 813-a) or in exceptional and very limited circumstances (§ 813-b). Within a year after passage of the statute, two plainclothes policemen were convicted under Penal Law §§ 738-41. Report 1959, p. 15. Evidence obtained by illegal eavesdropping is inadmissible in any civil or criminal proceeding (CPLR § 4506).



question is entitled to great weight when the same issue is presented for judicial review.

Motivated by the frightening occurrences in contemporary Europe and inspired by the Fourth Amendment to the United States Constitution, the delegates to the 1938 New York Constitutional Convention determined to regulate electronics eavesdropping. Instead of an absolute ban on wiretapping, the convention recognized that it should be done only by public officials pursuant to court order (Art. I, § 12). The original § 813-a adopted by the Legislature in 1942 (Laws 1942, Ch. 924) provided the procedure to effectuate the constitutional provision.

In 1955, prompted by the need for further regulation, the Legislature created a Joint Legislative Committee to study eavesdropping.\* Most of the New York legislation in the field was the result of the persistence and persuasiveness of this Committee whose overriding purpose was to protect the individual against the intrusion of electronic recording devices. Its own summary of its achievements and guiding principles is the best possible description of our statutory scheme.

“ . . . New York State has achieved, through Constitutional Amendment in 1938 and legislation in 1957 and 1958, a *comprehensive scheme* for the protection of the privacy of communications of persons within its jurisdiction.

It has guaranteed its people against unreasonable interception of telephone messages by law enforcement officers acting without ex parte orders or warrants, issued by the Court on good cause. It has extended

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\* Originally named the New York State Joint Legislative Committee to Study Illegal Interception of Communications, in 1958 the body became the New York State Joint Legislative Committee on Privacy of Communications and Licensure of Private Investigators. Its annual reports, published as Legislative Documents, and referred to hereinafter as “Report” by year, are as follows: Leg. Doc. 1956, no. 53; Leg. Doc. 1957, no. 29; Leg. Doc. 1958, no. 9; Leg. Doc. 1959, no. 25; Leg. Doc. 1960, no. 34; Leg. Doc. 1961, no. 30; Leg. Doc. 1962, no. 23.

this Court supervision to law enforcement eavesdropping, apart from wiretapping. It has established an absolute prohibition against eavesdropping by any private person, either through wiretapping or any other device, under penalty of two years imprisonment.

Besides these main points, our 1957 legislation recodified various other statutes under the new definition of eavesdropping: the prohibition against possession of eavesdropping equipment under circumstances evincing intention to use it illegally; the law against divulgence of confidential information; a requirement that the telephone company report cases of wiretapping.

This is a *comprehensive scheme* for the protection of privacy, and there is nothing to compare to it in the statutes of any other State or of the United States. There is obvious contrast between this systematic legislative treatment of a difficult problem and the few casual lines on interception and divulgence tucked away in the vast Federal Communications Act." Report 1960, pp. 31-32.

"During the year this Committee had advised the Legislature on privacy of communications. New York State has established a proud record in this field, which in 1955 was one of noisome scandal. We have redefined eavesdropping and recodified the law related thereto. We have made it a felony without exception for any private person to engage in electronic eavesdropping other than wiretapping. We have tightened the law on police wiretapping as authorized by our State Constitution; for the first time anywhere, we have required the issuance of a court order, i.e., a warrant, to validate law enforcement evidence obtained through secret microphones. We have excluded from the courts, civil and criminal, evidence resulting from violation of these laws."

•   •   •



"The Fourth Amendment and its spirit have always been in the forefront of this Committee's mind in advising this Legislature on eavesdropping legislation. For this reason we have insisted on the need for a court order, i.e., a warrant issued on reasonable cause, be required to validate evidence obtained by eavesdropping, whether by wiretap or other means. Our new law, chapter 986, buttresses that restriction." Report 1962, pp. 9, 10-11.

In light of this Court's recognition of a state's right to develop its own workable rules within Constitutional guarantees (*Ker v. California*, 374 U. S. 23, 34 [1961]), and in light of the demonstrated necessity for electronic eavesdropping the carefully circumscribed procedures provided by the New York legislature are in accord with the Bill of Rights.

## CONCLUSION

The judgment below should be affirmed.

Dated: New York, New York, April 6, 1967.

Respectfully submitted,

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**APPENDIX****The Laws of New York State Regarding  
Electronic Eavesdropping****New York Constitution Bill Of Rights, § 12.**

“[Security against unreasonable searches, seizures and interceptions.]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof”.

**Penal Law, § 738.**

“Eavesdropping.

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aides, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or
2. not present during a conversation or discussion who wilfully and by means of instrument overhears

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or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping."

Penal Law, § 739.

**"Exemption.**

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs."

Penal Law, § 740.

**"Punishment for eavesdropping.**

A person who violates any subdivision of section seven hundred thirty-eight of this chapter shall be

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guilty of a felony punishable by imprisonment for not more than two years."

Penal Law, § 741.

"Person defined.

As used in this article, the word 'person' shall mean any individual, partnership, corporation or association including the subscriber to the telephone or telegraph service involved and any law enforcement officer."

Penal Law, § 742.

"Eavesdropping instruments.

A person who has in his possession any device, contrivance, machine or apparatus designed or commonly used for eavesdropping as defined in section seven hundred thirty-eight of this chapter, under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for eavesdropping, or knowing the same is intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he shall be guilty of a felony."

Penal Law, § 743.

"Divulging telephone and telegraph company information and impersonation of employees.

A person who:

1. wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic or a telephonic communication by connivance with a clerk, operator, messenger, or other employee of a telegraph or telephone com-

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pany; or being such clerk, operator, messenger, or other employee, wilfully divulges to anyone but the person for whom it was intended, the contents or the nature thereof of a telegraphic or telephonic message or dispatch intrusted to him for the transmission or delivery, or of which contents he may in any manner become possessed, or, occupying such position in a telegraph office wilfully refuses or neglects to transmit or deliver messages received at such office, except when such telegraphic or telephonic message or dispatch is in aid of or used to abet or carry on any unlawful business or traffic, or to perpetrate any criminal offense, and when it shall appear that any offense at law or unlawful business or traffic is being carried on or conducted in whole or in part by means of a telegraphic or telephonic message or dispatch, it shall be the duty of any corporation, officer or employee having knowledge of the same, to withhold such dispatch from delivery, and to further furnish to any public officer whose duty it is to prosecute any offense at law so aided and abetted or to the law enforcement agency having jurisdiction, all information in their possession, relating to said unlawful business or traffic, and to further assist in the identification of any person aiding or abetting in or conducting any such unlawful business or traffic; and any violation of the foregoing provisions of this section, or refusal or neglect to furnish information as provided hereinbefore, shall be punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment, 'provided however, that divulgence of the contents of a telegraphic communication to a law enforcement officer acting lawfully and in his official capacity in the investigation, detection or prosecution of crime shall not be criminal;' or

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2. by trick or false representation or impersonation, obtains or attempts to obtain from any telegraph or telephone company, any officer or any employee thereof, information concerning identification or location of any wires, cables, lines, terminals or other apparatus used in furnishing telegraph or telephone service, or any information concerning any communication passing over telegraph or telephone lines of any such company, or the existence, content or meaning of any record thereof, shall be guilty of a misdemeanor; or

3. by trick or false representation or impersonation, obtain or attempts to obtain access to any premises or to installations of any telegraph or telephone company upon such premises, shall be guilty of a misdemeanor."

**Penal Law, § 744.**

"Duty to report the law enforcement officers.

It shall be the duty of every telephone or telegraph corporation to report to the police department or district attorney having jurisdiction, any violation of subdivision one of section seven hundred thirty-eight of this chapter coming to its attention. Any wilful violation of this section shall be a misdemeanor punishable by a fine of five hundred dollars."

**Penal Law, § 745.**

"Disclosing confidential information.

Except in any trial, hearing or other proceeding, a person who wilfully discloses to any person, other than the telephone or telegraph company whose facilities are involved, or an employee or other authorized agent of the district attorney, attorney general or



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police officer making application for an order permitting eavesdropping, or a legislative committee or temporary state commission, any information concerning the application for, the granting or denial of orders for eavesdropping, or the identity of the person or persons whose communications, conversations, or discussions are the subject of an ex parte order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure, shall be guilty of a misdemeanor."

Code of Criminal Procedure § 813-a.

"Ex parte order for eavesdropping.

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such applica-

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tion. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

The Code of Criminal Procedure, § 813-b.

"Eavesdropping by law enforcement officers without court order under certain circumstances.

Orders for eavesdropping as set forth in section eight hundred thirteen-a of this code must be obtained before the eavesdropping commences, except as hereinafter in this section provided. A law enforcement officer may eavesdrop as described in subdivision two of section seven hundred thirty-eight of the penal law without a court order obtained pursuant to section eight hundred thirteen-a of this code only when he has reasonable grounds to believe (1) that evidence of crime may be thus obtained, and (2) that in order to obtain such evidence time does not permit an application to be made for such a court order before such eavesdropping must commence. In any such case an application for a court order pursuant to section eight

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hundred thirteen-a of this code must be made within twenty-four hours after such eavesdropping commenced. In computing said twenty-four hour period legal holidays shall not be considered. The application for such a court order must contain, in addition to the requirements set forth in section eight hundred thirteen-a of this code, the time when such eavesdropping commenced. If such application is granted, the order shall be made effective from the time the eavesdropping commenced. If the application is denied, the eavesdropping must cease immediately. Any violation of this section shall be a felony punishable by imprisonment for not more than two years."

Civil Practice Law and Rules § 4506:

"Eavesdropping evidence.

Evidence obtained by any act of eavesdropping, as defined in section seven hundred thirty-eight of the penal law, or by any act in violation of section eight hundred or by eavesdropping without court order, as permitted by said section of the code of criminal procedure, when an application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section seven hundred thirty-eight of the penal law or section eight hundred thirteen-b of the code of criminal procedure."